Nos. 03-892 and 03-907

AUG 17 2004

In The Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

JOHN W. BANKS, II,

Respondent.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

SIGITAS J. BANAITIS,

Respondent.

On Writs Of Certiorari To The United States Courts Of Appeals For The Sixth And Ninth Circuits

AMICI CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION, SOUTHEASTERN LEGAL FOUNDATION, DEFENDERS OF PROPERTY RIGHTS, AMERICAN CENTER FOR LAW AND JUSTICE, LIBERTY LEGAL INSTITUTE, OREGONIANS IN ACTION LEGAL CENTER, ALLIANCE DEFENSE FUND, NATIONAL LEGAL FOUNDATION, ATLANTIC LEGAL FOUNDATION, TEXAS JUSTICE FOUNDATION, NEW ENGLAND LEGAL FOUNDATION, AND LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, under Section 61(a) of the Internal Revenue Code, 26 U.S.C. § 61(a), a taxpayer's gross income from the proceeds of litigation includes the portion of his damages recovery that is paid to his attorneys pursuant to a contingent fee agreement.

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Mountain States Legal Foundation respectfully submits this *amici curiae* brief on behalf of itself, Southeastern Legal Foundation, Defenders of Property Rights, American Center for Law and Justice, Liberty Legal Institute, Oregonians in Action Legal Center, Alliance Defense Fund, National Legal Foundation, Atlantic Legal Foundation, Texas Justice Foundation, New England Legal Foundation, and Landmark Legal Foundation in support of Respondents. Pursuant to Supreme Court, Rule 37(3)(a), this brief is filed with the written consent of all the parties.[1]

INTEREST OF THE *AMICI CURIAE*

Whether attorneys' fees recovered by Public Interest Law Firms (PILFs) are taxable to their clients is of vital concern to Mountain States Legal Foundation and the other *amici*. If this Court rules in favor of the Commissioner with

[1] Copies of the consent letters have been filed with the Clerk of the Court with this brief. In compliance with Supreme Court Rule 37(6), *amici curiae* represent that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution for the preparation or submission of this brief.

sufficiently expansive language, there is reason to believe that the Commissioner will argue that attorneys' fees paid to PILFs are taxable to their clients. This would adversely impact the ability of PILFs to undertake their vital role in the judicial system: providing free legal services in matters of broad public interest to clients who could not otherwise afford legal representation. While *amici* represented here may have different views with respect to substantive issues of great public interest, they all agree that taxation of their clients for the attorneys' fees PILFs recover pursuant to federal fee-shifting statutes would be a blow to their mission of representing the public interest as Congress intended.

Therefore, *amici* support the taxpayers in this case and the decisions of the Sixth and Ninth Circuit Courts of Appeals and urge this Court to affirm those decisions. However, because Mountain States Legal Foundation and the other *amici*, as PILFs, are unique in their legal status, their "representation" agreements, and their relationship with their clients, they wish to demonstrate to this Court that their clients may not be taxed for the attorneys' fees received by PILFs that represent them and to inform this Court of the devastating impact that an expansive ruling for the Commissioner could have upon PILFs' ability to carry out their mission.

Mountain States Legal Foundation, like each of the other *amici* that have joined this brief, is organized and operated exclusively for charitable purposes, with no part of its net earnings inuring to the benefit of any private shareholder, member, or individual. As such, the *amici* are exempt from taxation as PILFs under § 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)). Necessarily, all the *amici* serve public rather than private interests in

their litigation. 26 C.F.R. § 1.501(3)(c)-1(d)(ii). Therefore, while PILFs litigate on behalf of private litigants, they do so only when the litigation can reasonably be said to serve a broad public interest, rather than a private interest, as provided by Rev. Proc. 92-59, which governs 501(c)(3) qualified PILFs. Pursuant to Rev. Proc. 92-59, none of the *amici* charge their clients legal fees, but rather provide legal services without charge to their clients.

In many cases, PILFs seek only declaratory and injunctive relief; in many other cases, damage awards are minimal. Because some of these cases take years to litigate to conclusion, PILFs' attorneys' fees incurred on behalf of their clients can be very substantial. PILFs earn those fees by serving an important role in the judicial system: protecting the public interest and providing legal representation to those citizens who cannot afford to hire a private attorney to defend or prosecute their interests in matters of public importance. Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States*, 7 Wash. U. J.L. & Pol'y 1, 8 (2001); *see also*, Daly, *In-Person Solicitation by Public Interest Law Firms; A Look at the ABA Code Provisions in Light of Primus and Ohralik*, 49 Geo. Wash. L. Rev. 309, 337 (1981) (arguing that PILFs "bring the American legal systems one step closer to attaining the goal of equal justice for all").

Even though PILFs' clients do not pay attorneys' fees, in light of the important role PILFs serve Congress intended for PILFs to take advantage of various federal fee-shifting statutes. *See*, *Blum v. Stenson*, 465 U.S. 886, 892-896 (1984) (non-profit, legal aid society entitled to attorneys' fees under 42 U.S.C. § 1988); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70, n. 9 (1980) (PILF entitled to attorneys' fees under Title VII of the Civil

Rights Act of 1964); *Cornella v. Schweiker*, 728 F.2d 978, 985-87 (8th Cir. 1984) (*pro bono* legal service organization entitled to attorneys' fees under the Equal Access to Justice Act); *Ed. A. Wilson, Inc. v. General Services Administration*, 126 F.3d 1406, 1409 (Fed. Cir. 1997) (under EAJA, an award of attorneys' fees is not contingent upon an obligation to pay counsel because the presence of an attorney-client relationship suffices to entitle prevailing litigants to receive fee awards if there is an express or implied agreement that the fee award will be paid to the legal representative); *Preseault v. United States*, 52 Fed. Cl. 667, 673-677 (Fed. Cl. 2002) (PILF entitled to attorneys' fees under the Uniform Relocation Assistance and Real Property Acquisition Policies Act) (*amici* New England Legal Foundation represented Preseault).

Likewise, the Commissioner, recognizing the important role PILFs play in the judicial process, has determined that PILFs are able to collect attorneys' fees incurred on clients' behalf pursuant to federal fee-shifting statutes without jeopardizing their 501(c)(3) status. For example, Rev. Proc. 92-59 allows PILFs to collect attorneys' fees if those fees are awarded by a court or administrative agency, or approved by such a body in a settlement agreement, but only if: (1) the likelihood or probability of a fee is not a consideration in the selection of the case; (2) a case in which a court awarded fee is possible is not accepted if the litigants have a sufficient commercial or financial interest in the outcome of the litigation to justify representation by a private law firm; and (3) the total amount of all attorneys' fees recovered by the PILF does not exceed 50 percent of the PILF's budget for legal functions, calculated over a five-year period.

Congress' intent that PILFs receive attorneys' fees under federal fee-shifting statutes would be frustrated,

however, if clients of PILFs had to include those attorneys' fees in their gross income. Take, for example, a plaintiff who sues for a violation of her civil rights. Such a plaintiff generally cannot afford to pay an attorney on an hourly basis; moreover, any potential damage award may not be large enough to entice a private attorney to enter into a "contingent fee" agreement. *See*, S.Rep. No. 94-1011, *reprinted in*, 1976 U.S.C.C.A.N. 5908, 5910 (recognizing that civil rights plaintiffs generally obtain injunctive relief that is sometimes accompanied by a modest damage award). Thus, the plaintiff may be able to vindicate her civil rights only if a PILF represents her free of charge. *See, e.g.*, *Missouri v. Jenkins*, 491 U.S. 274 (1989) (students represented by NAACP in school desegregation case). If these attorneys' fees were included in the plaintiff's gross income, she would be faced with a huge tax liability that she could not pay, which would create an insurmountable disincentive for her to vindicate her civil rights or to resist unlawful or unconscionable conduct by the federal or state governments. *See, e.g.*, Sager and Cohen, *How the Income Tax Undermines Civil Rights Law*, 73 S. Cal. L. Rev. 1075 (2000).

Thus, the *amici* herein deem it critical that their views of the issue before the Court be heard and that this Court's decision not be so expansive as to allow the Commissioner to argue that attorneys' fees recovered by PILFs are taxable to their clients.[2]

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[2] Without willing clients, PILFs could not fulfill their charitable purposes. Granted, PILFs could waive any attorneys' fees to which they may be entitled under fee-shifting statutes and, thus, avoid any potential tax liability to their clients. However, by allowing PILFs to receive attorneys' fees under fee-shifting statutes, Congress concluded that the receipt of these fees will ensure the continued existence and viability of PILFs, in order to fulfill the purposes intended by Congress.

STATEMENT OF THE CASE

Amici agree with the Statement of the Case set forth in the briefs of the Respondents.

SUMMARY OF THE ARGUMENT

The opinions of the Sixth and Ninth Circuits should be affirmed. However, should the Court reverse those decisions and rule in favor of the Commissioner, this Court should make clear that its ruling has no application to PILFs. PILFs' "representation" agreements are not "contingent fee" agreements, as set out in the Question Presented, because they do not involve the assignment of any client income or the discharge of any client indebtedness. Therefore, attorneys' fees recovered by PILFs under federal fee-shifting statutes are not includable in the gross income of PILFs' clients.

ARGUMENT

I. THE OPINIONS OF THE SIXTH AND NINTH CIRCUITS SHOULD BE AFFIRMED.

Amici agree with Respondents, in the particularized context of the facts and Question Presented: "Whether the gross income from the proceeds of litigation includes the portion of his damages recovery that is paid to his attorneys pursuant to a contingent fee agreement." In this context, *amici* support Respondents on the following points:

1. The attorneys' fees paid to the attorneys in these cases were earned by the attorneys and not the clients.
2. The position of the Commissioner in these cases results in double taxation.
3. The contingent fee agreements in these cases were in the nature of partnerships, joint ventures, or co-ownership of the claims and no assignment of income resulted from these agreements.
4. The attorneys' fees paid to the attorneys in these cases are not taxable to their clients.

In addition to the arguments set forth by Respondents, *amici* submit that this Court should uphold the opinions below because *amici* may be impacted adversely by a decision in favor of the Commissioner if the language of any such decision is sufficiently expansive to permit the Commissioner to apply it to tax PILFs' clients for attorneys' fees recovered by PILFs under federal fee-shifting statutes. Because this issue is critically different factually and legally from that presented to the Court in the cases before it, the *amici* have unique information and perspective that can assist the Court concerning the possible application the Commissioner may make of this case to tax PILFs' clients for the attorneys' fees recovered by PILFs under federal fee-shifting statutes.

II. PILFs' "REPRESENTATION" AGREEMENTS ARE NOT "CONTINGENT FEE" AGREEMENTS.

Should this Court determine that the fees paid to the attorneys in these cases are taxable income of their clients, this Court should provide that its holding does not

apply to "representation" agreements entered into by PILFs and their clients because those agreements are not "contingent fee" agreements that anticipatorily assign income or discharge debt.

There are only two theories on which the taxability to a client of attorneys' fees paid to the client's attorney, pursuant to a "contingent fee" agreement, may be predicated:

1. The "contingent fee" agreement constitutes an anticipatory assignment of taxable income earned by the client under *Lucas v. Earl*, 281 U.S. 111 (1930), and *Helvering v. Horst*, 311 U.S. 112 (1940). This requires a finding that some or all of the damage award represents the recovery of income earned by the client, under 26 U.S.C. § 61, and the attorney is to be paid from that damage award in an amount determined with reference to the amount of that award; or

2. The "contingent fee" agreement obligates the client to pay attorneys' fees determined by the amount of a damage award and those fees are paid by the opposing party, which constitutes a discharge of the client's indebtedness to the attorney, under 26 U.S.C. § 61(a)(12).

Neither of these theories applies to the unique "representation" agreements entered into by PILFs and their clients. PILFs' agreements are neither "contingent" agreements nor "fee" agreements as those terms are used in the Question Presented. Moreover, PILFs' "representation" agreements result in neither an anticipatory assignment of income by, nor a discharge of indebtedness of, the PILFs' clients.

A. REPRESENTATION AGREEMENTS BETWEEN PILFs AND THEIR CLIENTS DO NOT CONSTITUTE AN ANTICIPATORY ASSIGNMENT OF INCOME BY THEIR CLIENTS TO PILFs.

1) PILFs' attorneys' fees cannot constitute an assignment of income because the fees are recovered from third parties, not from any taxable damage award to their clients.

Unlike the Sixth and Ninth Circuits, several other circuits have held that attorneys' fees paid by a defendant to a plaintiff's attorneys pursuant to a "contingent fee" agreement must be included in the plaintiff's gross income based upon the anticipatory assignment of income doctrine. *E.g.*, *Kenseth v. Commn'r*, 259 F.3d 881 (7th Cir. 2001); *Young v. Commn'r*, 240 F.3d 369, 376-79 (4th Cir. 2001); *Hukkanen-Campbell v. Commn'r*, 274 F.3d 1312, 1313-15 (10th Cir. 2001), *cert. denied*, 535 U.S. 1056 (2002); *Baylin v. United States*, 43 F.3d 1451, 1454 (Fed. Cir. 1995). The agreements that those cases address are totally different from the "representation" agreements between PILFs and their clients. Those cases involved "contingent fee" agreements that entitled the attorneys to recover fees from their clients' damage awards based on the amount of those awards.

For example, in *Kenseth*, the plaintiff entered into a "contingent fee" agreement with a law firm to represent him in an age-discrimination suit against his former employer seeking, *inter alia*, a recovery of taxable past wages. 259 F.3d at 882. Pursuant to that agreement, the law firm received 40 percent of the proceeds of the settlement entered into between the plaintiff and his former

employer. *Id.* The Seventh Circuit determined that the "contingent fee" agreement had effectuated an anticipatory assignment of gross income earned by the client to the client's lawyer, contrary to *Earl* and *Horst*, *supra* at 8.

However, PILFs' "representation" agreements, consistent with PILFs' charitable purposes, do not allow PILFs to recover anything at all from damage awards or to determine the amount of attorneys' fees PILFs may recover under federal fee-shifting statutes by reference to the amount of such damage awards. Rather, PILFs, under agreement and applicable law, may recover only what the Court determines is a fair and reasonable amount, based on time spent, the complexity of the issues, and other factors, all in accordance with federal fee-shifting statutes. Because PILFs' agreements and applicable law do not permit PILFs: to recover attorneys' fees from any damages awarded to the clients; to base their attorneys' fees on the amounts of those damages; or indeed, even to consider attorneys' fees in deciding whether to take the case; the "representation" agreements of PILFs do not involve the anticipatory assignment of a client's gross income.

2) Attorneys' fees recovered by PILFs under federal fee-shifting statutes are earned by the PILF, not by the client, and therefore do not involve an assignment of the client's income.

Two cases, *Earl*, 281 U.S. at 114-15 (1930), and *Horst*, 311 U.S. at 114 (1940), formulated the "anticipatory assignment of income doctrine" and established the "first principle of income taxation: income must be taxed to him who earns it." *Commn'r v. Culbertson*, 337 U.S. 733, 739-740 (1949).

The anticipatory assignment of income doctrine cannot and does not apply to PILFs because PILFs, and not their clients, "earn" the attorneys' fees that might be awarded. Indeed, it is well established that *pro se* litigants are not entitled to attorneys' fees under federal fee-shifting statutes. *E.g.*, *Corrigan v. United States*, 27 F.3d 436 (9th Cir. 1994) (*pro se* litigants are not entitled to attorneys' fees under IRC § 7430); *Krecioch v. United States*, 316 F.3d 684, 688 (7th Cir. 2003) (*pro se* litigants are not entitled to attorneys' fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412); *Smith v. DeBartoli*, 769 F.2d 451, 453 (7th Cir. 1985) (*pro se* litigants are not entitled to attorneys' fees under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988); *Naekel v. Dep't of Transportation*, 845 F.2d 976, 979-980 (Fed. Cir. 1988) (*pro se* litigants are not entitled to attorneys' fees under Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)). Thus, if the PILFs' clients had represented themselves *pro se*, they would not have been entitled to an award of attorneys' fees. Hence, any attorneys' fees that may be recovered by PILFs are "earned" solely by the PILF that represents the client, not by the client. Therefore, the attorneys' fees, if taxable, must be taxed only to the PILF as the "tree" from which the "fruits" (*i.e.*, attorneys' fees) "grew." *Earl*, 281 U.S. at 115. A contrary conclusion would violate the "first principle of income taxation: that income must be taxed to him who earns it." *Culbertson*, 337 U.S. at 739-740.

The Commissioner might argue that the clients "earned" the attorneys' fees recovered by PILFs because, under most fee-shifting statutes, the client, as the prevailing party, is the one who is deemed to have incurred the attorneys' fees and, hence, the one who is entitled to an award of those fees. *See, e.g.*, Uniform Relocation Assistance

and Real Property Acquisition Policies Act (URA) 42 U.S.C. § 4654(c) ("the court . . . shall determine and award . . . plaintiff . . . reasonable attorneys fees"); 42 U.S.C. § 1988 (a court may award reasonable attorneys' fees to a "prevailing party"); *see also*, *Evans v. Jeff D.*, 475 U.S. 717, 731-732 (1986) (42 U.S.C. § 1988 does not bestow fee awards upon attorneys). The Commissioner's argument would be in error.

Although PILFs receive attorneys' fees for their representation of their clients, the clients are not obligated to pay any attorneys' fees because, in accordance with PILFs' charitable nature and Rev. Proc. 92-59, PILFs provide their legal services to clients free of charge.[3] The clients do agree, however, that, if awards of attorneys' fees were available under federal fee-shifting statutes, PILFs may seek those awards in the clients' names, as required by law. The clients further agree that any attorneys' fees recovered are the property of the PILFs.

The relationship between PILFs and their clients is analogous to the facts addressed by the Commissioner in Rev. Rul. 65-282, which involved a state law that provided that attorneys representing indigent clients were eligible for court-awarded attorneys' fees. *Id.* The question presented was whether an attorney who receives these court-awarded fees must include them in his gross income even though he is obligated contractually to turn the fees over to his employer, a legal aid society. *Id.* The Commissioner held that such fees were excluded from the attorney's

[3] The value of these services is not to be included in a client's gross income because the services were provided gratuitously by a charitable organization. *Cf.* 26 U.S.C. § 102 (excluding gifts from the definition of gross income).

gross income because the attorney received those fees as an "agent[] for the legal aid society." *Id.*; *see also*, Rev. Rul. 69-274.

Likewise, PILFs' clients act only as the PILFs' agents in applying for and, possibly, in being determined to have "incurred" attorneys' fees. Because the federal fee-shifting statutes provide that only the client is eligible for attorneys' fees, the attorney's fee application must be submitted in the name of the client. *Cf. Phillips v. General Services Admin.*, 924 F.3d 1577, 1582 (Fed. Cir. 1991) (request for attorneys' fees under EAJA must be made on behalf of the "prevailing party").

Rev. Rul. 80-364, which involved a suit filed by a union on behalf of its members against a company for violating a collective bargaining agreement, further supports this conclusion. After filing suit, the union and the company entered into a settlement agreement under which the company paid the union $40,000.00 in full settlement of all claims. *Id.* The union kept $6,000.00 of the settlement as attorneys' fees and returned $34,000.00 to the employees for back pay owed to them. *Id.* The back pay was distributed among the employees in proportion to their claims. *Id.*

The Commissioner concluded that the amount of the settlement that went toward attorneys' fees was not remuneration to the individual employees because the attorneys' fees reimbursed the union for expenses incurred to enforce the collective bargaining agreement. *Id.* Thus, although the union members had to pay taxes on the back pay they received, the attorneys' fees were excluded from their gross income. *Id.* In reaching this conclusion, the Commissioner evidently applied the "first principle of

income taxation: that income must be taxed to him who earns it." *Culbertson*, *supra*, 337 U.S. at 739-40.

There is no appreciable distinction between the facts in Rev. Rul. 80-364 and the facts involving the "representation" agreements of PILFs. Indeed, as to both cases: (1) the attorneys provide legal services to their clients free of charge;[4] (2) there is a payment to the client that constitutes either back pay or "just compensation"; (3) there is an agreement or statute that allows for court-awarded attorneys' fees; and (4) the clients have no legal claim to any attorneys' fees. If the attorneys' fees were not included in the client's gross income in Rev. Rul. 80-364, *a fortiori*, they may not be included in PILFs' clients' gross income.

B. THE RECOVERY OF ATTORNEYS' FEES BY PILFs PURSUANT TO FEDERAL FEE-SHIFTING STATUTES DOES NOT CONSTITUTE THE DISCHARGE OF AN INDEBTEDNESS.

The Commissioner considers attorneys' fees paid by a defendant to a plaintiff's attorney, pursuant to a "contingent fee" agreement, to be a discharge of a debt and, therefore, includable in the plaintiff's gross income. (Comm'rs' Brief at 19) *See*, 26 U.S.C. § 61(a)(12) (defining "gross income" to include "[i]ncome from discharge of indebtedness"). The Commissioner relies on *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716 (1929) (Comm'rs' Brief at 19), which does not involve attorneys' fees, and

[4] Although the union may have been the "named" plaintiff in Rev. Rul. 80-364, the "real" clients were the union members. *See, Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333, 341-344 (1977) (establishing that an association may sue on behalf of its members).

could have cited, as well, *Sinyard v. Commn'r*, 286 F.3d 756, 757 (9th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002), which does involve attorneys' fees. In *Sinyard*, the plaintiff entered into a "contingent fee" agreement with a law firm to represent him in two class action lawsuits against his former employer. Pursuant to that agreement, the law firm was to receive "one-third" of any recovery. *Id.* The lawsuits were settled with the former employer paying directly to the law firm the amount of attorneys' fees that the former employee owed. *Id.* at 757-758. In a split decision, a panel of the Ninth Circuit ruled that the attorneys' fees were includable in the client's gross income because the former employer, in paying the attorneys' fees directly to the attorney, was paying a debt that the client owed to his attorney. *Id.* at 758. This rule does not apply to PILFs.

PILFs are non-profit organizations that may not consider the possibility of the attorneys' fees available under federal fee-shifting statutes when they undertake to represent their clients, may not undertake cases in which an award of attorneys' fees is possible if the client can reasonably retain private counsel, and must represent their clients free of charge. Therefore, recovery of attorneys' fees by PILFs under federal fee-shifting statutes does not constitute the discharge of the clients' indebtedness. By agreement and by law, clients do not owe PILFs one penny for attorneys' fees, nor may those fees be charged to or recovered from PILFs' clients. There being no ability to assess and no obligation to pay attorneys' fees, there can be no indebtedness to be discharged. Indeed, the obligation to pay attorneys' fees belongs to the party ordered to do so under federal fee-shifting statutes. *See, e.g.*, 42 U.S.C. § 4654(c) (the court "*shall* determine and award" reasonable

attorneys' fees) (emph. supp.). Therefore, in paying attorneys' fees, the federal or state government agency or subdivision could not be discharging a debt owed by or a contractual obligation of the PILF's client. Instead, it would be satisfying only its own statutory obligation.

Moreover, "representation" agreements of PILFs are not "contingent fee" agreements as that phrase is used in the Question Presented. Such agreements are only "contingent if the obligation to pay depends on a particular result being obtained." *City of Burlington v. Dague*, 505 U.S. 557, 561 (1992). Generally, if the client does not win, no debt arises and the attorney does not get paid. *Id.* Thus, "contingent fee" agreements allow clients who are unable to finance their own litigation to pursue their claims by assigning a portion of any future damage award to an attorney in exchange for the attorney's assumption of the financial risk associated with an unsuccessful outcome. *Gisbrecht v. Barnhart*, 535 U.S. 789, 810 (2002) (Scalia, J., dissenting). Attorneys are willing to assume the risk associated with such agreements because, *inter alia*, those agreements allow them to expand their potential client base to include clients who cannot afford to pay an hourly fee.

Thus, the distinctive characteristics of a "contingent fee" agreement include: (1) a debt will be incurred by the plaintiff to his attorney if he prevails by recovering a damage award: (2) that debt will be discharged by either the plaintiff or a third party; and (3) the attorney possesses a pecuniary interest that is determined by reference to the amount of and payable from the damages awarded to the client. By contrast, the "representation" agreements of PILFs contain none of these elements because attorneys' fees are neither paid from nor determined by the amount

of the damages awarded and there is no debt incurred by the client to the PILF.

III. PUBLIC POLICY DICTATES THAT ANY ATTORNEYS' FEES RECOVERED BY PILFs PURSUANT TO FEDERAL FEE-SHIFTING STATUTES NOT BE INCLUDED IN THE GROSS INCOME OF THEIR CLIENTS.

A decision sufficiently expansive to allow the Commissioner to argue that attorneys' fees recovered by PILFs are taxable to their clients is not in the public interest. Congress has recognized expressly that a successful civil rights plaintiff acts, not only for herself, but also as a "private attorney general" by "vindicating a policy that Congress considered of the highest priority." *See*, S.Rep. No. 94-1011, *reprinted in*, 1976 U.S.C.C.A.N. 5908, 5910. A putative civil rights plaintiff, however, will not file suit if she may incur a tax liability when her PILF receives court-awarded attorneys' fees under a fee-shifting statute. Thus, if the Commissioner is successful here, the entire nation, not just the individual citizen, will suffer because "those who violate the Nation's fundamentals laws" will do so with "impunity." *Id.*

Not only would enforcement of federal civil rights laws suffer, but enforcement of federal environmental laws will also suffer. Since 1970, Congress has allowed private citizens to enforce federal environmental laws by including "citizen suit" provisions in them. *See, e.g.*, the Clean Air Act, 42 U.S.C. § 7604(d); the Clean Water Act, 33 U.S.C. § 1365; the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(e); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9659(f); and the Endangered Species Act, 16 U.S.C.

§ 1540(g). These "citizen suit" provisions generally authorize two types of actions: (1) enforcement actions against violators; and (2) actions to compel the appropriate federal agency to perform nondiscretionary duties required by the statute. Dunne, *Attorney's Fees For Citizen Enforcement of Environmental Statutes: The Obstacles for Public Interest Law Firms*, 9 Stan Envtl. L.J. 1, 2-3 (1990). Because these "citizen suits" do not result in an award of damages, Congress included an attorneys' fees provision that allows courts to award attorneys' fees to the "successful citizen-enforcers." *Id.* Congress included these attorneys' fees provisions to ensure that the "citizen-enforcers" had competent representation. *Id.* at 5. Moreover, Congress sought to entice PILFs to represent "citizen-enforcers" by allowing the PILFs to recover their attorneys' fees under these fee-shifting provisions. *Id.* at 8.

Congress' intent, however, would be defeated if "citizen-enforcers" had to include the attorneys' fees that were awarded to their PILFs in their gross income. Indeed, under such a scenario, putative "citizen-enforcers" of modest means would not file suit because they could not afford the concomitant tax liability. This would leave the enforcement of federal environmental statutes to either the wealthy or the federal government, neither of which is a "suitable champion" to ensure compliance with federal environmental laws.[5]

The effects of a ruling sufficiently expansive to allow the Commissioner to argue that the recovery of attorneys'

[5] Indeed, if the federal government were capable of ensuring compliance with all of the federal environmental statutes, Congress would have had no reason to include "citizen suit" provisions in those statutes.

fees by PILFs is taxable to their clients will also be felt outside the PILF arena. Take, for example, a union that represents a member, on a *pro bono* basis, in a wrongful discharge suit. If the union prevails, it may be entitled to court-awarded attorneys' fees under either a federal fee-shifting provision or a collective bargaining agreement. *See*, *Raney v. Federal Bureau of Prisons*, 222 F.3d 927 (Fed. Cir. 2000) (federal employee union entitled to attorneys' fees under the Back Pay Act). There has been no suggestion that the union member must include the attorneys' fees received by the union in his gross income. *See*, Rev. Rul. 80-364 (payment of union's attorneys' fees not includable in a union member's "gross income"). Yet, an expansive ruling in the instant cases might yield that result.

Finally, clients of the private bar will also feel the effects of an adverse ruling. Most states recommend that private attorneys provide a certain amount of *pro bono* legal services each year. *E.g.*, Colorado Rules of Professional Conduct 6.1 (recommending 50 hours per year). Many attorneys fulfill this goal by representing indigent clients. Although these attorneys do not charge their clients a fee, often a court will award fees to the attorney under a fee-shifting statute. A sufficiently expansive adverse ruling in the instant cases, however, could result in the inclusion of such attorneys' fees in the gross income of an indigent client. Such a result would mean that taxes would be paid on the attorneys' fees twice, once by the private attorney and once by the indigent client. More seriously, such a result would deny legal representation to indigent clients. *Porter v. U.S. Agency for Int'l Dev.*, 293 F.Supp.2d 152, 155-57 (D.D.C. 2003).

CONCLUSION

The opinions of the Sixth and Ninth Circuits should be affirmed. However, should the Court reverse those decisions and rule in favor of the Commissioner, this Court should make clear that its ruling has no application to PILFs because those agreements do not assign any income of their clients and because recovery by PILFs of attorneys' fees under federal fee-shifting statutes is not a discharge of any client indebtedness. Hence, the "representation" agreements of PILFs are not "contingent fee" agreements, as used in the Question Presented, and attorney fees recovered by PILFs under federal fee-shifting statutes are not includable in the gross income of PILFs' clients.

Respectfully submitted,

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